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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-66

FAIRFAX-BREWSTER SCHOOL, INC.,
Petitioner,

v.

COLIN M. GONZALES, Infant, by
Raymond Gonzales and
Margaret R. Gonzales, his parents,
and

RAYMOND GONZALES and
MARGARET R. GONZALES,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY BRIEF

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I. FULL CONSIDERATION OF THE LEGISLATIVE HISTORY OF THE CIVIL RIGHTS ACT OF 1866 IS NECESSARY TO THE CORRECT DECISION OF THIS CASE

Petitioner devoted a large part of its brief to a detailed review and analysis of the legislative history of the Civil

Rights Act of 1866. In contrast, not a single opposing brief (including those filed by *amici curiae*) concerns itself with legislative history. Instead, it appears that the common tactic of all opponents is simply to cite *Jones v. Mayer*, 392 U.S. 409 (1968), as the final word on the subject. But *Jones* did not involve any question of school integration, and even if the Court's interpretation of the Act's legislative history led to the correct result in that case, it would still be necessary in this case to comb through the legislative history to ascertain, if possible, the specific intent of Congress with respect to the question of integrating schools. This the petitioner did, and it is submitted that it is established beyond dispute that it was the intent of Congress in enacting the Civil Rights Act of 1866 *not* to require racial integration of schools, nor to prohibit racial discrimination in the admissions policies of schools, nor to in any way disturb the maintenance of separate, segregated schools for children in the United States.

The expressed reliance upon *Jones* as decisive on the question of whether Congress intended the Civil Rights Act of 1866 to require racial integration of schools is at odds with the fact that leading civil rights groups and advocates have known for many years that Congress had precisely the opposite intent. The writings of Alfred H. Kelly, constitutional historian and professor of history at Wayne State University, and Richard Kluger, author of *Simple Justice – The History of Brown v. Board of Education and Black America's Struggle for Equality*[1], make this quite clear.

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[1] Alfred A. Knopf, New York, 1976.

Professor Kelly, who is described by Kluger as key advisor to the NAACP's Legal Defense Fund during the *Brown* reargument,[2] in a paper entitled "An Inside View of Brown v. Board," which he read to the American Historical Association at its annual meeting on December 28, 1961,[3] stated that he found to his surprise that the debates printed in the 1866 volumes of the Globe had a good deal to say about school segregation, and that:

> ". . . The original civil rights bill, as reported out on the Senate floor by Lyman Trumbull early in 1866, had indeed been so broadly worded that it obviously would have struck down and outlawed entirely all State segregation laws – those sanctioning segregated schools as well as Jim Crow transportation facilities, and so on. Moreover, the desegregation features of the bill had indeed been attacked bitterly in the Senate as revolutionary and monstrous by several Senators, among them Garret Davis of Kentucky, Reverdy Johnson of Maryland, and the conservative Republican Cowan of Pennsylvania. Cowan, in particular, had denounced the bill on the ground that it would obviously do away with all segregated schools in the several States, only to have several Republican Radicals tell him that it was about time he woke up to the fact that there was a social and constitutional revolution going on in the country

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[2] Kluger, op. cit., at 799.

[3] Hearings before a Subcommittee of the Committee on the Judiciary of the U.S. Senate, 87th Cong., 2nd Sess., on the nomination of Thurgood Marshall to be United States Circuit Judge for the Second Circuit, May 1, July 12, August 8, 17, 20 and 24, 1962, p. 170. (This is the only publication petitioner's counsel could find in which Professor Kelly's paper is printed in full.)

and that he had better accommodate himself to it. Nonetheless, the bill passed the Senate with its sweeping language intact, Trumbull having defended it as merely an implementation of the 13th amendment and what he insisted on calling the 'bill of rights' incorporated in the 'privileges and immunities clause' in article IV of the old Constitution. So far, very good from the NAACP point of view.

"But when the civil rights bill reached the House, John A. Bingham, himself a Radical of Radicals and a member of the Committee of Fifteen, bitterly attacked the measure, on the grounds that Congress utterly lacked the power to legislate against legalized segregation in the States, either under the 13th amendment or the old 'privileges and immunities' clause in article IV. To do so, he said, was grossly unconstitutional. And although Wilson of Iowa somewhat weakly protested that the bill as then written could not be construed as banning legally segregated schools, Bingham's attack sent the bill back to the House Judiciary Committee, where the disputed ambiguous language was stricken out. Thereafter, it was reported to the floor once more, this time in a form which absolutely eliminated the controversial segregation language. The conclusion for any reasonably objective historian was painfully clear: The Civil Rights Act as it passed Congress was specifically rewritten to avoid the embarrassing question of a congressional attack upon State racial segregation laws, including school segregation . . ."

For statements to the same effect by Kluger, see Chapter 24, "The Six-Month Summer", pp. 617-656 of *Simple Justice.*

There is another impelling reason why the interpretation placed upon the legislative history of the Act in *Jones* cannot be considered controlling here. Not one of the numerous briefs filed in *Jones* fully or adequately informed the Court on the legislative history of the Act. Not a single brief informed the Court of the amendment striking the "no discrimination in civil rights" clause. Not a single brief informed the Court of the debate that resulted in that amendment. And because the opinion for the Court fails to mention the amendment or the debate that led to it, it seems clear that the Court was unaware of it.

The joint brief filed in *Jones* by the National Committee against Discrimination in Housing, the N.A.A.C.P., the Anti-defamation League of B'nai B'rith, and the American Jewish Congress, as *amici curiae*, cited tenBroek's *Equal under Law*[4] three times, and the Court cited it four times. Yet, although tenBroek in his chapter entitled "The Third Congressional Debate" (the debate on the Civil Rights Act of 1866), at page 180 refers to the "prohibition against any discrimination in civil rights" contained in the bill, counsel for petitioner has been unable to find any disclosure in tenBroek of the fact that the bill was amended before enactment to eliminate that prohibition.

Moreover, the brief of the *amici curiae* just mentioned contained at least four quotations from remarks made during the debate on the bill aimed at showing how "broad and sweeping" the speaker understood or intended the bill to be,

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[4] Collier Books, 1965.

and the opinion for the Court in *Jones* contains a considerable number of [redacted] quotations or references to remarks of that character, including four of the quotations contained in the *amici* brief, although all of such remarks were made *before* the deletion of the "no discrimination in civil rights" clause – at a time, therefore, when the bill indeed appeared to be "broad and sweeping." The quotations or references contained in the opinion for the Court are listed below:

(a) quotation from Congressman Wilson (Cong. Globe, 39th Cong., 1st Sess., at 1118), appearing at 392 U.S. 443-444;

(b) quotation from Senator Trumbull (Cong. Globe, 39th Cong., 1st Sess., at 322), appearing at 392 U.S. 440;

(c) reference to remarks of Senator Howard (Cong. Globe, 39th Cong,, 1st Sess., at 504), appearing at 392 U.S. 433, n. 55;

(d) quotations from Senator Trumbull (Cong. Globe, 39th Cong., 1st Sess., at 77, 474, 599), appearing at 392 U.S. 431-432;

(e) quotation from Senator Lane (Cong. Globe, 39th Cong., 1st Sess., at 603), appearing at 392 U.S. 433;

(f) reference to remarks of Senator Cowan (Cong. Globe, 39th Cong., 1st Sess., at 500), appearing at 392 U.S. 433, n. 56;

(g) reference to remarks of Senator Hendricks (Cong. Globe, 39th Cong., 1st Sess., at 601), appearing at 392 U.S. 433, n. 56;

(h) reference to remarks of Congressman Bingham (Cong. Globe, 39th Cong., 1st Sess., at 1292), appearing at 392 U.S. 424, n. 31;

(i) quotation from Senator Trumbull (Cong. Globe, 39th Cong., 1st Sess., at 323), appearing at 392 U.S. 424, n. 31.

In addition, counsel has been unable to find in any of the briefs filed in *Jones,* or in the majority or dissenting opinions, any reference to the fact that the language "as is enjoyed by white citizens" was not contained in the bill as introduced, but was added by amendment in committee; or any reference to the colloquy between Congressman Wilson and Congressman Delano (quoted pp. 42-44, Pet. Br.), in which Wilson explained that the limited purpose and intent of the amendment was to preclude a construction of the statute that would remove the existing legal disabilities of minors and females; or any reference to the highly significant colloquy between Senators Van Winkle and Trumbull, which is set forth below:

> "The President pro tempore: The Senator from Kentucky asks that the question be taken on the amendments separately. The first amendment is . . .
>
> The next amendment was in section one, line seventeen, after the word 'property', to insert the words 'as is enjoyed by white citizens.'
>
> MR. VAN WINKLE: There seems to be an incongruity in this language to which I wish to call the attention of the chairman of the committee. The clause commences with the words 'and such citizens.' As I understand those words they include all persons who are or can be citizens, white persons and all others. The clause then goes on to provide that 'such citizens of every race and color, without regard to any previous condition of slavery or involuntary servitude,

shall have the same right to make and enforce contracts,' &c., 'as is enjoyed by white citizens.' It seems to me these words are superfluous. The idea is that the rights of all persons shall be equal; and I think the clause, leaving out these words, would attain the object. This is merely a verbal criticism. I think the bill is incongruous in expression as it stands.

MR. TRUMBULL: I quite agree with the Senator from West Virginia that these words are superfluous. I do not think they alter the bill. I think the bill would be better without them, but they have been adopted by the House of Representatives. We did not think they altered the meaning of the bill; and we did not think it worth while to send the bill back just because these words were inserted by the House. They thought there was some importance in them and have inserted them; and as in the opinion of the committee which examined this matter they did not alter the meaning of the bill, the committee thought proper to recommend a concurrence, and I hope the Senate will concur in it.

MR. VAN WINKLE: It is a mere verbal correction that I suggested, and I am not at all strenuous about it; nor perhaps should I have made it had I been aware that the attention of the committee had been called to it.

The amendment was concurred in." (Cong. Globe, 39th Cong., 1st Sess., 1413)

II. THE FACT THAT PETITIONER IS A FOR-PROFIT CORPORATION DOES NOT DEPRIVE IT OF ITS FIRST AMENDMENT AND OTHER CONSTITUTIONAL RIGHTS, NOR DOES ITS ADVERTISEMENT IN THE YELLOW PAGES OF THE TELEPHONE DIRECTORY AFFECT ITS STATUS AS A PRIVATE ESTABLISHMENT OR MAKE IT A PUBLIC ACCOMMODATION.

In a landmark case decided by this Court in 1925, *Pierce v. Society of Sisters,* 268 U.S. 510, which is discussed at page 60 of Petitioner's principal brief, the defendant in the companion case, *Pierce v. Hill Military Academy,* was a for-profit corporation. As stated by the Court, at page 532:

> "Appellee Hill Military Academy is a private corporation organized in 1908 under the laws of Oregon, engaged in owning, operating, and conducting for profit an elementary, college preparatory, and military training school for boys between the ages of five and twenty-one years. The average attendance is one hundred, and the annual fees received for each student amount to some $800. . . . It owns considerable real and personal property, some useful only for school purposes. The business and incident good will are very valuable . . ."

For other decisions holding that those who engage in commercial pursuits are not in consequence stripped of their First Amendment rights, see: *Ginzburg v. United States,* 383 U.S. 463, 474 (1966); *New York Times v. Sullivan,* 376 U.S. 254, 265-266 (1964); *Smith v. California,* 361 U.S. 147, 150 (1959); *Time v. Hill,* 385 U.S. 374, 396 (1967); *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar,* 377 U.S. 1 (1964); *United Mine Workers v. Illinois Bar Ass'n,,* 389 U.S. 217, 223 (1967); and *Bigelow v. Virginia,* 421 U.S. 809 (1975).

The contention that the mere placing of a card or advertisement in the yellow pages of the telephone directory strips a private school of its status as a private establishment, with the right to maintain a racially discriminatory admissions policy if it wants to, is wholly without merit. Many parents would know neither the names nor the locations of private schools if it were not for the yellow pages. To carry such an advertisement is an aid to them. If they are interested enough to request further information, as authorized in the School's advertisement in the yellow pages (A. 74), they will quickly learn of the high standards for admission and continuance as a student in the School, and that the School reserves the right to exclude any applicant for any reason it may choose (A. 66). It was established by uncontradicted testimony that the School does not advertise in newspapers, magazines, radio or television (A. 239) and that most of the parents who send their children to the School learn about it from other parents (A. 238). It is clear from the uncontradicted evidence submitted on behalf of the School, which is detailed and discussed in full in Petitioner's principal brief, that the School is *not* open to all white children whose parents can pay the price of admission.

The correspondence between Jefferson and Madison on the subject of adoption of a Bill of Rights is significant in this connection. In the beginning it was Jefferson who most clearly saw the need for a Bill of Rights, but in the end Madison was as fully convinced of its necessity. See *Mason*, The States Rights Debate, Prentice-Hall, Inc., 1964, and especially pp. 167-185. Madison's letter of October 17, 1788, to Jefferson (*Mason*, op. cit., at 173) is especially instructive. At page 174 Madison said:

> ". . . Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents . . ."

The same letter appears in Boyd, *The Papers of Thomas Jefferson*, Princeton University Press, 1958, at page 19.

The seemingly uncontrollable impulse of some idealistic individuals, and of church groups and other organizations dedicated to social reform, to impose their own concepts of what is morally and religiously right[5] upon the rest of us, is especially noticeable in the area of race relations. While such individuals and organizations are probably not in the majority, they have a dominant voice and influence on the public scene. The Bill of Rights was intended to

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[5] "The heart of the race question is moral and religious . . ." *Catholic Bishops Speak on Racial Discrimination and the Moral Law*, Statement of Principles and Objectives, Catholic Interracial Council of Chicago, National Catholic Welfare Conference, for the Bishops of the United States, November 14, 1958 (Hearings Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, U.S. Senate, 86th Cong., 1st Sess. (Civil Rights - 1959), Part 4, Appendix-continued, p. 2744).

protect our private rights even from invasion by the well-intentioned.

Respectfully submitted,

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